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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP No.	NC-06-1223-DBPa
		)		
7	GERALD ADOLPHUS LYNCH and	)	Bk. No.	05-43135-RN
	DORIS MAE GILL,	)		
8		)		
	Debtors.	)		
9		)		
	_____	)		
10	JOHN T. KENDALL, Chapter 7	)		
	Trustee,	)		
11		)		
	Appellant,	)		
12		)		
	v.	)	<b>O P I N I O N</b>	
13		)		
	GERALD ADOLPHUS LYNCH; DORIS	)		
14	MAE GILL,	)		
		)		
15	Appellees.	)		
16	_____	)		

Argued and Submitted on November 17, 2006  
at San Jose, California

Filed - January 11, 2007

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Hon. Randall J. Newsome, Chief Bankruptcy Judge, Presiding.

\_\_\_\_\_

Before: DUNN, BRANDT and PAPPAS, Bankruptcy Judges.

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1 DUNN, Bankruptcy Judge:

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3 The chapter 7 trustee appeals an order compelling him to  
4 abandon debtors' residence. We REVERSE and REMAND.

5  
6 FACTS

7 Gerald Adolphus Lynch and Doris Mae Gill ("debtors") filed a  
8 joint chapter 13<sup>1</sup> petition on June 8, 2005, together with the  
9 required schedules. In their schedules, the debtors valued their  
10 residence at \$560,000, subject to a deed of trust held by Downey  
11 Savings Bank in the approximate amount of \$422,000, and to the  
12 debtors' \$150,000 homestead exemption. The debtors' chapter 13  
13 plan ("Confirmed Plan") was confirmed without opposition by order  
14 entered July 27, 2005. When the debtors were no longer able to  
15 perform the Confirmed Plan, the case was converted, on their  
16 motion, to chapter 7 on January 20, 2006.

17 Asserting that the value of the residence was \$669,000, John  
18 T. Kendall, the chapter 7 trustee ("Trustee"), obtained an order  
19 authorizing him to employ counsel to assist in the sale of the  
20 debtors' residence. Because he anticipated that such a sale  
21 would result in a distribution to creditors, the Trustee  
22 requested that a claims bar date be set in the chapter 7 case.  
23 In response, the debtors moved to compel the Trustee to abandon

24  
25 \_\_\_\_\_  
26 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,  
28 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-  
9036, as enacted and promulgated prior to the effective date  
(October 17, 2005) of most of the provisions of the Bankruptcy  
Abuse Prevention and Consumer Protection Act of 2005, Pub. L.  
109-8, April 20, 2005, 119 Stat. 23 ("BAPCPA").

1 the residence, arguing pursuant to § 554(b) that the residence  
2 was of inconsequential value and benefit to the estate. The  
3 bankruptcy court granted the motion to compel abandonment,  
4 holding that in connection with confirmation of the plan, the  
5 residence had been implicitly valued in the amount scheduled by  
6 the debtors, and pursuant to § 348(f)(1), that value was binding  
7 on all the parties upon conversion of the case to chapter 7. The  
8 Trustee filed this timely appeal.

#### 9 10 JURISDICTION

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
12 §§ 1334 and 157(b)(1). We have jurisdiction over this appeal  
13 pursuant to 28 U.S.C. § 158(a)(1).  
14

#### 15 ISSUE

16 Whether an implied valuation of the debtors' residence  
17 occurred in conjunction with confirmation of the Confirmed Plan,  
18 binding on a chapter 7 trustee in a converted case.  
19

#### 20 STANDARD OF REVIEW

21 We review a bankruptcy court's interpretation of the  
22 Bankruptcy Code de novo. See Einstein/Noah Bagel Corp. v. Smith  
23 (In re BCE West, L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003).  
24

#### 25 DISCUSSION

26 1. A Valuation of the Residence Made in the Chapter 13 Case Is  
27 Binding on the Trustee.

28 Any valuation of the debtors' residence that was made in a

1 chapter 13 case applies in the chapter 7 case upon conversion.

2 Except as provided in paragraph (2), when a case under  
3 chapter 13 of this title is converted to a case under  
another chapter under this title -

4 (A) property of the estate in the converted case shall  
5 consist of property of the estate, as of the date of  
6 filing of the petition, that remains in the possession  
of or is under the control of the debtor on the date of  
conversion; and

7 (B) valuations of property and of allowed secured  
8 claims in the chapter 13 case shall apply in the  
converted case.

9 11 U.S.C. § 348(f) (1).

10 In this case, the debtors scheduled their residence at a  
11 value of \$560,000. No one challenged that value in the context  
12 of plan confirmation or otherwise while the case was pending in  
13 chapter 13. In fact, after an investigation of recent sales in  
14 the area of the debtors' residence, the chapter 13 trustee  
15 concluded that the debtors' valuation of their residence in their  
16 schedules was correct.

17 Because no party raised any objection to confirmation, the  
18 bankruptcy court confirmed the debtors' chapter 13 plan without a  
19 hearing. In its order confirming the Confirmed Plan, the  
20 bankruptcy court made the requisite findings pursuant to  
21 § 1325(a), including a finding that:

22 The value, as of the effective date of the Plan, of  
23 property to be distributed under the Plan on account of  
24 each allowed unsecured claim is not less than the  
amount that would be paid on such claim if the estate  
of the Debtor were liquidated under Chapter 7 of this  
title on such date[.]

25  
26 The question before us is whether the explicit finding made  
27 in the confirmation order pursuant to § 1325(a) (4) was also an  
28 implicit finding that the value of the debtors' residence was

1 \$560,000 as scheduled, i.e., an implicit valuation.

2  
3 2. How Courts Have Approached the Issue.

4 The majority of courts that have considered the issue have  
5 held that, in the absence of a contested valuation proceeding,  
6 the order confirming a chapter 13 plan incorporates an implicit  
7 finding that the value of the debtor's residence is the value at  
8 which the debtor scheduled the residence. See, e.g., Warren v.  
9 Peterson, 298 B.R. 322 (N.D. Ill. 2003); In re Niles, 342 B.R. 72  
10 (Bankr. D. Ariz. 2006); In re Slack, 290 B.R. 282 (Bankr. D.N.J.  
11 2003); In re Page, 250 B.R. 465 (Bankr. D.N.H. 2000).

12 Three primary rationales have been advanced for the majority  
13 position. First, when the bankruptcy court concludes in the  
14 confirmation order that the value of property to be distributed  
15 under the plan to unsecured creditors is not less than they would  
16 receive in a chapter 7 liquidation, as required pursuant to  
17 § 1325(a)(4), if there is no explicit valuation of the debtor's  
18 property in a contested proceeding, the bankruptcy court must  
19 rely on the scheduled values of the debtor's assets. If the  
20 chapter 13 trustee or unsecured creditors believe that the  
21 debtor's property is valued too low in the schedules, they have  
22 the opportunity to object prior to confirmation. Warren v.  
23 Peterson, 298 B.R. at 325-26.

24 Second, treating the confirmation order as incorporating an  
25 implicit valuation of property appears consistent with the  
26 legislative history of § 348(f)(1).

27 This amendment would clarify the Code to resolve a  
28 split in the case law about what property is in the  
bankruptcy estate when a debtor converts from chapter

1 13 to chapter 7. The problem arises because in chapter  
2 13 . . . , any property acquired after the petition  
3 becomes property of the estate, at least until  
4 confirmation of the plan. Some courts have held that  
5 if the case is converted, all of this after-acquired  
6 property becomes part of the estate in the converted  
7 chapter 7 case, even though the statutory provisions  
8 making it property of the estate do not apply to  
9 chapter 7. Other courts have held that the property of  
10 the estate in a converted case is the property the  
11 debtor had when the original chapter 13 petition was  
12 filed.

13 These latter courts have noted that to hold  
14 otherwise would create a serious disincentive to  
15 chapter 13 filings. For example, a debtor who had  
16 \$10,000 equity in a home at the beginning of the case,  
17 in a State with a \$10,000 homestead exemption, would  
18 have to be counseled concerning the risk that after he  
19 or she paid off a \$10,000 second mortgage in the  
20 chapter 13 case, creating \$10,000 in equity, there  
21 would be a risk that the home could be lost if the case  
22 were converted to chapter 7 (which can occur  
23 involuntarily). If all of the debtor's property at the  
24 time of conversion is property of the chapter 7 estate,  
25 the trustee would sell the home, to realize the \$10,000  
26 in equity for the unsecured creditors and the debtor  
27 would lose the home.

28 H.R. Rep. No. 103-835 at 57 (1994), as reprinted in 1994  
U.S.C.C.A.N. 3340, 3366. See, e.g., Warren v. Peterson, 298 B.R.  
at 326 n.1 ("Section 348(f) was adopted to ensure that property,  
such as Warren's residence, would not be liquidated as a result  
of converting to chapter 7."); and In re Wegner, 243 B.R. 731,  
734 (Bankr. D. Neb. 2000) ("Section 348(f)(1)(B) assures that  
property of a successor Chapter 7 case excludes the amount by  
which property appreciates during the pendency of a Chapter 13  
case.").

Finally, treating a chapter 13 confirmation order as  
incorporating an implicit valuation of the debtor's property  
arguably serves judicial economy.

Establishing the valuation of property at an early

1 stage in the proceedings ensures both stability and  
2 finality. Valuations need not be re-examined if the  
3 case converts from chapter 13 to chapter 7.  
4 Determining the present value of property, such as real  
estate, is already a complicated issue, and calculating  
the historic value of property is even more  
complicated.

5 Warren v. Peterson, 298 B.R. at 326.

6 One court has rejected the implicit valuation concept. In  
7 re Jackson, 317 B.R. 511, 513 (Bankr. N.D. Ill. 2004). The  
8 Jackson court concluded that the provisions of § 348(f)(1)(B) and  
9 congressional intent could be met by a valuation made, if  
10 necessary, after a chapter 13 case has been converted to chapter  
11 7.

12 [T]he bankruptcy court can simply hold a valuation  
13 hearing at or near the time of a proposed sale in the  
chapter 7 to determine what the real property was worth  
14 when the chapter 13 petition was originally filed. The  
court could refuse to approve any sale proposed by the  
15 trustee if the property had insufficient equity at the  
start of the chapter 13 case and/or had not appreciated  
16 sufficiently after conversion.

17 Id. at 516.

18 The Jackson analysis has the attraction of avoiding the  
19 reliance, inherent in the implicit valuation cases, on a  
20 fictional valuation based solely upon the value in the debtors'  
21 schedules. In this case, while it eventually was persuaded to  
22 accept the debtors' argument, the bankruptcy court expressed  
23 concern about the implications of relying on a "valuation" that  
24 never occurred:

25 But, you know, when you think about it, here's the  
26 problem. I find this case law disturbing because it's  
obvious that--to me, that nobody--if there's no  
27 objection, and if--supposing you've got a hundred  
percent plan in a chapter 13 case and the debtor  
values--low-balls the value of the house. There's not  
28 an incentive really for a chapter 13 trustee to object.

1       There's not any incentive obviously for creditors to  
2       object. So when I confirm that plan, under this, I've  
3       made an implicit valuation when nothing of the kind has  
4       really happened.

5       Transcript of June 7, 2006 Hearing, page 4, lines 10-20.

6       Ultimately, we find the Jackson approach more logically  
7       compelling because it avoids reliance on the fiction that the  
8       court has determined the value of the debtors' residence in an  
9       uncontested chapter 13 confirmation. Determining that the "best  
10      interest" test of § 1325(a)(4) has been met involves an  
11      evaluation of what creditors would receive in a hypothetical  
12      chapter 7 liquidation of all of a debtor's assets, not just the  
13      residence. Where there is no evidence that the court even looked  
14      at the scheduled value of the debtor's residence prior to  
15      confirming a chapter 13 plan, it is impossible to determine if  
16      the court considered the relative values of the debtor's  
17      scheduled assets, including the residence, in deciding that the  
18      "best interest" test was met.

19      In addition, we believe it is the Jackson approach that  
20      better serves judicial economy by recognizing that valuation  
21      determinations need be made only when required in the context of  
22      contested proceedings. Section 348(f)(1)(B) does not require  
23      that a valuation occur while the chapter 13 case is pending. In  
24      contrast, if, as the debtors contend, parties are bound to the  
25      debtors' values by confirmation of a plan, prudent chapter 13  
26      trustees and unsecured creditors may demand that debtors produce  
27      actual valuation evidence at confirmation, even though the  
28      valuation may not necessarily impact the amount to be paid to  
29      creditors, solely to protect the creditors' rights in the event

1 of a subsequent conversion.

2       Endorsing implicit valuation in connection with confirmation  
3 of chapter 13 plans, especially of residential real estate,  
4 ignores the realities of the bankruptcy process. Debtors lack  
5 any motivation to list the values of assets in their schedules at  
6 any higher amounts than necessary to satisfy the requirements of  
7 good faith. Mortgage lenders have little reason to care about  
8 the scheduled values of houses; their claims generally must be  
9 paid without regard to the scheduled values. And unsecured  
10 creditors are primarily concerned about the extent of the  
11 debtor's disposable income and the amounts to be distributed on  
12 their claims. If a plan proposes what are perceived to be  
13 sufficiently generous payments to unsecured creditors, they will  
14 pay little attention to the debtor's position concerning the  
15 values of assets, since those assets will not be liquidated.  
16 Finally, and perhaps most important, bankruptcy courts, whose  
17 chapter 13 calendars may include several dozen cases in a single  
18 session, cannot be expected to consider and rely specifically  
19 upon the values placed by debtors on their homes and other  
20 assets. The notion that the bankruptcy court makes a reasoned  
21 decision in confirming an uncontested chapter 13 plan is patently  
22 unrealistic. A chapter 13 trustee may look beyond debtors'  
23 scheduled residence values in selected cases. However, chapter 7  
24 trustees generally are motivated, on behalf of the unsecured  
25 creditors collectively, to ensure that true market values are  
26 assigned to the debtor's assets. As a result, it makes sense  
27 that a valuation occur, if necessary, in the converted chapter 7  
28 case.

1           The Jackson court recognized that in adopting the amended  
2 version of § 348(f)(1) in 1994, Congress intended to encourage  
3 chapter 13 filings rather than chapter 7 liquidations. Jackson,  
4 317 B.R. at 516. The Jackson court further found nothing in its  
5 approach that was inconsistent with that policy.

6           [It is the assurance that debtors may keep any  
7 appreciation of their property during the chapter 13  
8 case that promotes reorganization over liquidation. If  
9 the judicial gloss of implicit valuation becomes  
10 binding precedent, savvy debtors may purposely  
11 underestimate the value of real property on their  
12 schedules, stay in chapter 13 long enough to confirm a  
13 plan, and then convert to chapter 7 to capture the  
14 "appreciation." Such a result undermines the policy of  
15 protecting appreciation by encouraging dishonest  
16 appraisals of property value.

17 Id.

18 3. In a Case Converted from Chapter 13 to Chapter 7, the Value  
19 of the Residence on the Chapter 13 Petition Date Controls.

20           In this case, the Trustee seeks to sell the debtors'  
21 residence in hopes of realizing approximately \$43,000 in net  
22 proceeds to the chapter 7 estate and creditors, based upon  
23 February 2006 values. However, the relevant valuation date for  
24 purposes of § 348(f)(1)(B) is the chapter 13 filing date, June 8,  
25 2005. See Jackson, 317 B.R. at 516; and In re Wegner, 243 B.R.  
26 at 734.

27           There is nothing in the record indicating that the value of  
28 the debtors' residence on the chapter 13 petition date was any  
higher than the \$560,000 value that they scheduled. In fact, the  
chapter 13 trustee's analysis confirmed that the debtors had not  
undervalued their residence.

Excluding equity resulting from debtors' payments on loans

1 secured by their residence and property appreciation subsequent  
2 to their chapter 13 filing in a case converted to chapter 7  
3 serves the congressional purpose of encouraging chapter 13  
4 reorganizations over chapter 7 liquidations, as reflected in the  
5 legislative history. See Section 2 supra. That interpretation  
6 is buttressed by the language of § 348(f)(2), that provides, in  
7 contrast to § 348(f)(1)(B), if a debtor converts a chapter 13  
8 case to chapter 7 in bad faith, "the property in the converted  
9 case shall consist of the property of the estate as of the date  
10 of conversion." (Emphasis added).

11 If Congress intended in § 348(f)(1)(B) that, in the absence  
12 of a contested valuation proceeding in chapter 13, the chapter 7  
13 trustee would capture postpetition appreciation upon conversion,  
14 the "bad faith" provision in § 348(f)(2) would appear to be  
15 unnecessary.<sup>2</sup> The record does not reflect any allegation that  
16 the debtors filed either their chapter 13 petition or the  
17 Confirmed Plan in bad faith. If, on remand, the Trustee  
18 determines that, based on a retrospective valuation as of the  
19 chapter 13 petition date, selling the debtors' residence would  
20 result in no meaningful distribution to unsecured creditors, he  
21 can acquiesce to abandonment.

## 22 23 CONCLUSION

24 The bankruptcy court erred in granting the debtors' motion  
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26  
27 <sup>2</sup>In BAPCPA, with its focus on debtor personal  
28 responsibility, § 348(f)(1)(B) has been amended to provide that  
"valuations of property...in [a] chapter 13 case" shall not apply  
"in a case converted to a case under chapter 7."

1 to compel abandonment of their residence by the Trustee in the  
2 absence of a valuation determined as of the chapter 13 petition  
3 date. Accordingly, we REVERSE and REMAND.

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